INDEPENDENT REVIEW OF ADMINISTRATIVE LAW
Call for Evidence

Evidence of Deighton Pierce Glynn Solicitors

Summary

1. As a leading public law and civil liberties firm, Deighton Pierce Glynn ("DPG") is well-placed to respond to the Independent Review of Administrative Law's call for evidence. We provide brief details of DPG's work below before addressing the questions in the Call for Evidence.

2. The panel will be aware of the concerns voiced by DPG along with four other claimant public law firms in our joint letter of 2 September 2020 to the Lord Chancellor: that the panel's terms of reference were very broad and not matched by its resourcing, evidence gathering or membership. We welcome the broader call for evidence that the panel has made since that letter was written. However, we still have serious concerns that the terms of reference are overly broad, make controversial assumptions, exclude necessary context and require a substantial evidence-gathering exercise in order to be fulfilled.

Overarching Concerns

3. We are concerned that the Terms of Reference cannot be answered without substantial empirical and statistical evidence gathering, over a substantial period of time, in order to monitor the judicial review caseload nationally and to discern how it operates in practice. We are able to provide anecdotal evidence, but clear statistical information can only be gathered from the courts service and from persons commissioned to study the same. This will be necessary to answer Question 4 in the Terms of Refence, which suggests substantial procedural and substantive reforms to the judicial review process. It is important that the panel 'puts a marker down' in its response to government that any future reforms must be evidence-based, tested and will require additional consultation and consideration before implementation.

4. There is a premise underlying the Terms of Refence ("ToR") that the balance between "*the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts*" and "*the role of the executive to govern effectively under the law*" has become misaligned. The strong suggestion – between the lines in the ToR but very much within the lines of the government's rhetoric – is that the balance has tipped too far in favour of judicial review claimants. A rigorous analysis of the evidence may well show – we submit it does show – that this premise is false.

Judicial reviews remain very hard to win; the courts take an appropriately deferential approach to executive decision making. The appeal process exists to ensure that the balance is struck in an individual case.

5. Because of this premise, the reforms canvassed in the ToR and Call for Evidence are unidirectional: they are concerned with codification and limitation of judicial review only, without regard to broader considerations of the rule of law and access to justice. For example, asking "*should certain decisions not be subject to judicial review?*" without asking whether other decisions could be usefully brought within the scope of judicial review. The panel should not close its mind to reforms that are not of a limiting character. It should start from a position of balance and have particular regard to overarching considerations of the rule of law and access to justice.

6. Another consequence of the assumed premise is that the ToR and Call for Evidence fail to consider the 'upstream' causes that lead to judicial reviews being brought. The panel needs to examine these issues and take them into consideration, lest it reach conclusions that unfairly visit upon claimants problems which really lie at the feet of defendants or elsewhere (and thus fail to achieve the government's aims). It is essential that the panel considers and accords due weight to these wider causes. For example:

   - the efficiency of government departments in responding to judicial reviews;

   - the delays in central government departments in providing instructions to the Government Legal Department;

   - policy decisions taken by government departments to oppose claims they are likely to lose;

   - the complexity, rate of change and comparatively very high volume of domestic parliamentary law making[1];

   - the growth in law making by statutory instrument[2]; and

   - the deterioration in the quality and oversight of government decision-making, particularly in response to Brexit and the COVID-19 pandemic and the knock-on effect that this domination of civil service 'bandwidth' has on decision-making in other areas.

[1] See the study of First Parliamentary Counsel and Permanent Secretary of the Cabinet Office in 2013, identifying a marked increase in volume of primary legislation over the preceding 40 years. This growth rate is even greater once secondary legislation is added-in: https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex. See also the Report of the House of Commons Political and Constitutional Reform Committee, 'Ensuring standards in the quality of legislation', 9 May 2013 (https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf).
This work needs to be updated and expanded.

[2] Erskine May, Overview of delegated legislation (https://erskinemay.parliament.uk/section/5613/overview-of-delegated-legislation/)

7. The ToR and Call for Evidence also focus on "executive" and "Government" decisions. The application of judicial review to local authorities and other public authorities appears to be a secondary concern. This is an imbalanced starting point when a lot of what appears to be contemplated would apply to judicial review cases across the board.

8. A flawed premise and a closed mind to proper context will undermine all that follows. The panel should therefore tread very carefully in recommending reforms in what is a constitutionally important area.

9. Before recommending limitations on judicial review, the panel should give significant weight to the concentrating influence on government decision-making that an effective judicial review system has, as acknowledged by government and reflected in its 'Judge Over Your Shoulder' guidance[3].

About Deighton Pierce Glynn

10. Deighton Pierce Glynn is a firm of solicitors specialising in civil liberties, human rights and public law, with three offices based in London and Bristol in the UK. It has particular specialisms in community care and mental capacity; actions against the police; detention and prison claims; equality and discrimination matters; environmental and planning law; healthcare; housing, destitution and migrant rights; international human rights; inquests; and assisting victims of crime. The firm has a particular reputation for its representation of disabled people, persons in detention and vulnerable individuals such as victims of torture, human trafficking and sexual exploitation; unaccompanied child immigrants; and those with serious mental health needs, including people who lack mental capacity (where we are instructed by the Official Solicitor). A significant proportion of our clients have English as a second language or limited literacy skills.

11. Most of DPG's clients are individuals, although we also act for and with charities and non-governmental organisations such as Amnesty International, Privacy International, Southall Black Sisters, Medical Justice, Inclusion London and the Red Cross. The vast majority of our work is funded through legal aid, although we also have substantial experience of crowdfunded litigation.

12. Our clients litigate not for commercial reasons, but to eliminate discrimination, to prevent or to seek redress for interferences in fundamental rights or to bring public bodies to account in relation to issues of wider public importance. We have a long track-record of helping people who are not wealthy secure access to justice.

[3] https://www.gov.uk/government/publications/judge-over-your-shoulder

13. We employ 40 solicitors and paralegals based in London and Bristol. We have a national reputation in our specialist areas, representing clients from throughout England and Wales[4].

14. We would be happy to supply further information to the review about any of the vulnerable client groups we assist, either directly or by putting the review in touch with the public bodies and charities who refer clients to us.

Responses to Questions in the Call for Evidence

15. Our responses are below. We have omitted Section 1 as it was addressed to Government Departments (although we note that this section should have been directed to all public authorities).

Question 3: ***Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?***

16. The basic parameters of judicial review are laid down in statute e.g. s31 Senior Courts Act 1981. If codification were to seek to move beyond procedure to grounds of judicial review then this would limit flexibility for all parties and the courts. It is hard to see how codification of a body of law developed under the common law will bring benefits to claimants, defendants or the court. It would either be too reductive and therefore misleading or comprehensive and thereby lose the clarity that codification might bring and risk losing the flexibility that is the hallmark of the procedure.

17. There is an obvious risk of satellite litigation: if disclosure was limited, then litigants would start applying for it; if standing was limited then there would be preliminary issue trials; ouster clauses too would be litigated, with obvious natural justice limitations (e.g. as per the reasoning of the Supreme Court in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22).

Question 4: ***Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?***

18. This is another example of the benefits of a flexible approach and the perils of codification. Examining whether a decision is of a sufficiently public character requires a case-by-case analysis. It cannot be determined by the identity of the body making the decision but by the decision itself. Excluding certain decisions would have to be framed with extreme precision and even then, the limitations of ouster clauses are clear (see above).

[4] http://www.dpglaw.co.uk/litigation-and-public-law-solicitors/reputation/

19. Insofar as this question is a veiled reference to the *Miller* case, we would urge caution in seeking to legislate in response to a decision which is an outlier. Codification in response would risk rendering 'ordinary' judicial review less effective and lead to a flourishing of satellite issues and that should not be the price borne by a perceived need to response to this case. Though we would add that setting 'some' legal limit on a government power to suspend parliament indefinitely is not controversial in constitutional law terms, and it is unlikely that the government would avoid litigation would a similar measure be taken in the future, whatever legislative response is taken.

Question 5: ***Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?***

20. To us, as practising judicial review lawyers, the answer is – generally speaking – yes. The Administrative Court Guide[5] is now a useful innovation in drawing together basic information in a relatively accessible, freely available format.

21. This question could be much more usefully directed at litigants in person, which underlines our concerns about the limited resourcing and scope of the panel's call for evidence (since it is unlikely many if any such litigants will provide evidence in response).

Question 6: ***Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?***

22. The requirement to file an application for a judicial review promptly and in any event not later than three months after the grounds to make the claim first arose – save for in planning and procurement cases – generally strikes the right balance taking into account the need to try and find a solicitor and obtain legal advice, comply with the pre-action protocol, obtain legal aid, instruct counsel and prepare the claim. The parties generally cooperate in judicial review proceedings, mindful of its public importance, and this is something that should not be overlooked. There can be problems in delays in granting public funding in some cases however, and better provision could be made for this.

23. However, a big problem is that people are not aware of the possibility to make an application for a judicial review of a decision by a public body until it may be too late, as public bodies rarely advise a person that the decision may be subject to a judicial review or the deadline for making the claim.

24. If further reforms in the name of streamlining the process are sought, then it may be

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf

possible to remove the Detailed Grounds & Evidence stage in some claims, where a Defendant has already set out its position in its Acknowledgement of Service & Summary Grounds of Resistance and the subject matter of the claim does not require substantial evidence from the Defendant.

25. A further reform that should be encouraged to streamline the process is discouraging Defendants from opposing the grant of permission reflexively, in the hope of securing a procedural knock-out blow, when it is plain that the claim merits detailed consideration at a substantive hearing. Defendants are not required to oppose permission, but this has almost become an unwritten rule.

Question 7: ***Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?***

26. The costs picture is already very difficult for prospective claimants. Unlike other litigation there is often a big disparity in resources between claimant and defendant and at present this is not sufficiently reflected in the costs rules.

27. Generally, the courts do award costs against the unsuccessful party. However, there are instances when the claimant has had to result to judicial review because the public body refuses to engage with the pre-action protocol process or to reconsider its decision, only to then do so after the claim is issued. Defendants often claim that the reconsideration would have happened regardless of the claim being brought, which in our experience is highly misleading. However, in these circumstances the courts may not be willing to accept that the defendant was unsuccessful so the claimant may not obtain their costs.

Question 8: ***Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?***

28. The costs of judicial review claims cannot be related to the 'value' of a claim in monetary terms, since they often relate to non-monetary matters and carry additional benefits in vindicating the rule of law and ensuring good governance. It would seem that costs of judicial reviews are generally lower than other litigation at the High Court level.

29. Proportionality of legal costs in judicial review claim is achieved through orders on costs which provide that if costs cannot be agreed between the parties then they are subject to a Court assessment; the costs judge will only award costs if they are deemed to be proportionate: "Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred" (CPR 44.3(2)(a)).

30. The court fees for making a claim and particularly the fees if a claimant is granted permission to proceed are high and can be a barrier to accessing rights by way of a judicial review.

31. The present arrangements for addressing standing and unmeritorious claims are adequate. If a minority of practitioners are abusing process to e.g. frustrate removals then the courts have identified this and reported practitioners in the past. The 'totally without merit' designation also gives the court another tool to warn parties and practitioners.

Question 9: ***Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?***

32. Judicial review remedies are flexible, although the Courts generally limit themselves to quashing the original decision or making declarations of unlawfulness, rather than re-making the decision underchallenge afresh. In our experience. In our experience there has been a deterioration in government respecting such findings, often leading to the Defendant re-making the same unlawful decision. New proceedings may need to be brought. This can be at high and unnecessary cost, just because the public body repeats its same poor decision making and the court's inability to re-make the relative decision. It would be beneficial if the courts had greater tools to identify where this is happening.

Question 10: ***What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?***

33. As solicitors acting for claimants, we will invariably comply with the pre-action protocol, not least because there are costs consequences if we fail to do so. However, very often defendants fail to meaningfully engage the claim, or at all, before it is issued at Court. This appears to be a question of resourcing in e.g. the Home Office. This is despite the purpose of the pre-action protocol period being an opportunity for the Defendant to reconsider its decision. If this happened more often before the claim was issued rather than afterwards, then the need to proceed with a judicial review would certainly be minimised.

Question 11: ***Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?***

34. Frequently when a challenge is made to a delay with a decision being made, usually a delay in providing accommodation or another essential service to a destitute person, the claim settles prior to trial and often prior to the permission stage. This happens

because the defendant fails to engage with the claim at the pre-action protocol stage.

35. Claims do settle prior to trial occasionally. This may be because the defendant has not properly engaged with the claim before then (the process being largely claimant-led at the outset, procedurally-speaking), they probably weren't aware of the law and their prospects, persons in client departments had not properly engaged with the claim, and advise is received from counsel not to proceed.

Question 12: ***Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?***

36. We do represent clients in mediation outside of judicial review cases so are experienced in mediation and are aware of the benefits of this. However the nature of the issues at stake in a judicial review often do not readily admit to compromise in the same way that monetary claims do: the interpretation of a particular statute, or the provision of support or accommodation to a destitute person. Where appropriate we do propose it. We are very open to this being encouraged and considered further. The settlement and compromise of judicial reviews through more informal means e.g. without prejudice discussions post-issue, is a more regular occurrence.

Question 13: ***Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?***

37. The "sufficient interest" in s31(3) Senior Courts Act 1981 is sufficient. Seeking to impose a narrower, more precise test would be artificial and out of step with the purpose of judicial review, which is concerned with public wrongs, not the vindication of private rights. Litigants with no connection to their subject matter are very rare.

38. We have acted in cases where the role of an NGO litigant was crucial to raising points of public concern that individuals were not able to vindicate themselves. For example, where public authorities are aware that a practice or policy is likely to be unlawful but are able to 'buy-off' claimants bringing judicial reviews by settling their cases without addressing the underlying practice/policy. There is a clear role for NGOs to represent the broader cohort and bring a claim that resolves the underlying unlawfulness in those circumstances.

Deighton Pierce Glynn
26 October 2020